

These are the tentative rulings for civil law and motion matters set for Tuesday, November 29, 2011, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, November 28, 2011. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0045143 Granite State Insurance Co. vs. Paynter, Chip A.

The motion to set aside the default is denied.

The court understands the thrust of the defendant's argument to be that opposing counsel corresponded to him on March 14, 2011 soliciting defendant's agreement to a stipulation to allow the filing of the First Amended Complaint. The letter, in para. 2, stated in part "... It will not be necessary for you to respond to the first madden complaint because the provision that no response is needed and that any new matter in the first amended complaint is deemed denied by you." Defendant contends that, because of the quoted language he was unaware, when the court granted the motion to amend the complaint on July 5, 2011, that an amended answer would be required.

The opposition declaration avers that the bench officer who heard the motion to amend, the Hon. Margaret E. Wells, advised defendant that he would need to file an amended pleading. Such a recitation does not appear in the minutes, and the court has not considered it.

The declaration of Robert L. Pollack submitted in support of the motion to amend states, at 2:2-5 that counsel did not receive a response to his March 14, 2011 solicitation of the stipulation.

Defendant knew that he did not sign the stipulation, and there is no evidence that he was thereafter advised that he need not file an amended answer. The filing of the amended answer is required by CCP Sec. 471.5. Generally, the failure to apprise oneself of applicable requirements will not thereafter support an application for relief under CCP Sec. 473. See, Elms v. Elms (1946) 72 Cal.App.2d 508, 513.

2. M-CV-0049551 Northern California Coll. Serv, Inc. vs. Alberti, Aaron J.

Appearance required on plaintiff's Motion to Compel Responses to Specially Prepared Interrogatories, set one.

The motion is granted. Within 20 days defendant will serve full and complete answers, without objections, to the first set of specially prepared interrogatories

3. M-CV-0052694 River City Investors, LLC vs. Rivera, Cristina, et al

Appearance required on defendants' Motion to Quash Service of the Summons.

4. S-CV-0026023 Knieriem, Andy & Rosa vs. Do, Robert et al.

Defendants Bank of America, N.A., for itself and as successor by merger to BAC Home Loans Servicing, LP, The Bank of New York Mellon, ReconTrust Company, N.A. and Mortgage Electronic Registration System, Inc.'s demurrer to the first amended complaint is sustained without leave to amend.

Plaintiffs' first and second causes of action for fraud and misrepresentation fail to state valid causes of action against Bank of America, N.A. ("BofA") and its successors in interest. Plaintiffs allege no conduct by demurring defendants in support of this cause of action. To the extent plaintiffs seek to attach liability to BofA based on the actions of MILA, Inc., the original lender, plaintiffs fail to show that BofA had knowledge of any wrongdoing by MILA, Inc. Plaintiffs fail to plead how, when and where any representations by defendants were tendered. *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645. When pleading fraud against corporate defendants, plaintiffs must specify the identity of the person who made the misrepresentation, his authority to speak on behalf of the corporation, and when and to whom the representation was made. *Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157. A lender owes no duty to a borrower to ensure that the borrower has the ability to repay his loan. *Nymark v. Heart Fed. Sav. & Loan Ass'n* (1991) 231 Cal.App.3d 1089, 1096. These claims are time-barred, as they arose at the time that the loans closed, and plaintiffs fail to allege any facts to show why they could not have discovered their claims earlier. *Casualty Ins. Co. v. Rees Inv. Co.* (1971) 14 Cal.App.3d 716, 719-720.

Plaintiffs' third cause of action for breach of fiduciary duties fails to state a valid cause of action against BofA and its successors in interest. The relationship between a lending institution and its borrower-client is not fiduciary in nature. *Nymark v. Heart Fed. Sav. & Loan Ass'n*, *supra*, 231 Cal.App.3d at 1093. Lenders do not owe any duty to a borrower to disclose what the borrower may or may not be able to afford. *Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 436. This claim is time-barred, as it arose at the time that the loans closed, and plaintiffs fail to allege any facts to show why they could not have discovered their claims earlier. *Casualty Ins. Co. v. Rees Inv. Co.*, *supra*, 14 Cal.App.3d at 719-720.

Plaintiffs' fourth cause of action for violation of Business and Professions Code section 17200 fails to state a valid cause of action against demurring defendants. Plaintiffs do not allege that they have suffered injury in fact and lost money or property as a result of any alleged unfair practices by demurring defendants. Bus. & Prof. Code § 17204; *R&B Auto Ctr., Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 360; Bus. & Prof. Code § 17535. A UCL claim requires a violation of the underlying law. A defense to the predicate claim is a defense to the UCL claim. *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1505. Plaintiff does not establish that any act by any demurring defendant caused loss to plaintiff. Plaintiffs do not establish a specific law or laws that were violated, or that any of demurring defendants committed fraud.

Plaintiffs' fifth cause of action for unjust enrichment fails to state a valid cause of action against demurring defendants. Unjust enrichment is inapplicable where a defendant has merely obtained what it was entitled to receive pursuant to a contract. *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1541. Plaintiffs' sixth cause of action for accounting fails to state a valid cause of action against demurring defendants. "A cause of action for accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.

Plaintiffs' seventh cause of action for quiet title fails to state a valid cause of action against demurring defendants. Plaintiffs fail to allege tender of, or the ability to tender, the full amount owing on the underlying loan. *Karlsen v. American Sav. & Loan Ass'n* (1971) 15 Cal.App.3d 112, 117; *U.S. Cold Storage v. Great W. Sav. & Loan Ass'n* (1985) 165 Cal.App.3d 1214, 1222-1223. Plaintiffs' eighth cause of action for declaratory relief fails to state a valid cause of action against demurring defendants. Plaintiffs do not state a cognizable legal basis for vesting title in themselves. Code Civ. Proc. § 761.020. Plaintiffs fail to allege any actual, present controversy between plaintiffs and demurring defendants. To the extent this cause of action is based on allegations of the previous causes of action, it fails because those causes of action fail. Plaintiffs' ninth cause of action for injunctive relief and a temporary restraining order fails to state a cause of action. Injunctive relief is a remedy, not a cause of action. Injunctive relief is not appropriate where there is no valid underlying claim to support it. *Guessous v. Chrome Hearts, LLC* (2010) 179 Cal.App.4th 1177, 1187.

Plaintiffs bear the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. A demurrer shall be sustained without leave to amend absent a showing by plaintiffs that a reasonable possibility exists that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The first amended complaint does not suggest on its face that it is somehow capable of amendment and plaintiffs have failed to make any showing that the first amended complaint can be amended to change its legal effect.

The court declines to consider the federal district court cases cited by defendants, as trial court decisions, either of the state or federal courts, are not precedential to this court. Defendants' request for judicial notice is granted as to Exhibits A through D.

5. S-CV-0026349 Amato, Jerry F. vs. Del Webb California Corp.

The motion for approval of good faith settlement is dropped as moot.

6. S-CV-0026441 Banc of America Prac. Solutions, Inc. vs. Alfred Osolin DDS

Appearance required on plaintiff's Motion to Set Aside Dismissal.
Plaintiff's unopposed motion is granted.

7. S-CV-0026797 Pollack, Kirsten, et al vs. Rocklin Foreign Car, et al

Plaintiff's demurrer to cross-complaint is dropped. The action has been stayed pursuant to the notice of stay of proceedings filed October 20, 2011.

8. S-CV-0027919 Sandry, Chad Dillon, et al vs. First Franklin Financial Corp

Defendants First Franklin Financial Corporation (“First Franklin”), Home Loan Services, Inc. (“HLS”), and Mortgage Electronic Registration Systems, Inc.’s (“MERS”) demurrer to plaintiffs’ second amended complaint is sustained without leave to amend.

Plaintiffs’ first cause of action for deceit fails to state a valid cause of action. First, plaintiffs have not adequately alleged an agency relationship between the lender, First Franklin, and their mortgage broker, Loan Review Incorporated (“LRI”). Plaintiffs have specifically alleged facts that they contend support their position that an agency relationship existed between the broker and the lender in this case. (SAC, ¶¶ 83-89). These specifically alleged facts are insufficient to establish an agency relationship. Plaintiffs do not allege that First Franklin authorized LRI to represent and bind it as its agent. Civ. Code § 2295. Plaintiffs do not allege that First Franklin knew that LRI was holding itself out as First Franklin’s agent, or caused plaintiffs to believe that LRI was acting as its agent. Civ. Code § 2300. An agency cannot be created by the acts of the agent alone. Conduct by the principal is essential to create agency. *Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 587-588.

Plaintiffs also fail to adequately allege justifiable reliance. Reliance on an alleged misrepresentation is not reasonable when the plaintiff could have ascertained the truth through exercise of reasonable diligence. *Rosenthal v. Great W. Fin. Securities Corp.* (1996) 14 Cal.4th 394, 426. In this case, plaintiffs do not deny that the loan documents they signed contained all of the terms of which they now complain. “[O]ne who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he has not read it.” *Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 163. With respect to the purportedly inflated appraisal, lenders owe no duty of care to the borrower in preparing an appraisal of the security for the loan, since the purpose of the appraisal is to protect the lender, not the borrower. *Nymark v. Heart Fed. Savings & Loan Ass’n* (1991) 231 Cal.App.3d 1089, 1098.

Further, plaintiffs do not adequately allege damages. Payments made by plaintiffs were due under the loan agreements and cannot constitute damages. *Auerbach v. Great W. Bank* (1999) 74 Cal.App.4th 1172, 1185. The risk of losing their home is a future, speculative item of damages that is not actionable. Finally, plaintiffs’ claim for deceit is also barred by the applicable statute of limitations. Plaintiffs do not adequately allege facts justifying the tolling of the statute of limitations.

Plaintiffs’ second cause of action for civil conspiracy fails to state a cause of action as plaintiffs do not adequately establish a wrongful act that would support a cause of action without the conspiracy. *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1541.

Plaintiffs’ third cause of action for negligence fails to state a valid cause of action, as plaintiffs fail to adequately allege a duty owed by defendants to plaintiff, that defendants breached that duty, and that breach of that duty proximately caused plaintiffs’ injuries. *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1145. A financial institution generally owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. *Nymark v. Heart Fed. Savings & Loan Ass’n, supra*, 231 Cal.App.3d at 1096. With respect to the purportedly inflated appraisal, lenders owe no duty of care to the borrower in preparing an appraisal of the security for the loan, since the purpose of the appraisal is to protect the lender, not the borrower. *Id.* at 1098.

Plaintiffs' allegation that First Franklin exceeded its scope as a mere lender of money by conspiring with LRI to deceive plaintiffs is insufficient to establish a duty owed to plaintiffs. Plaintiffs do not allege facts showing that First Franklin actively participated in the loan transaction beyond the domain of a usual money lender. *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 35. Even if plaintiffs did establish that defendants acted beyond the role of a traditional lender in this case, the second amended complaint fails to allege that defendants' breach proximately caused plaintiffs any damages. Payments made by plaintiffs were due under the loan agreements and cannot constitute damages. *Auerbach v. Great W. Bank, supra*, 74 Cal.App.4th at 1185. Speculative future injury, such as the possible loss of their home, is not actionable.

Plaintiffs' fourth cause of action for breach of fiduciary duty fails to state a valid cause of action. The relationship between a lending institution and its borrower-client is not fiduciary in nature. *Nymark v. Heart Fed. Sav. & Loan Ass'n, supra*, 231 Cal.App.3d at 1093. A contractual relationship amounting to a debtor/creditor relationship does not create a fiduciary duty. *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 32-33. Plaintiffs do not allege facts sufficient to support the existence of a fiduciary relationship between plaintiffs and defendants. Further, as stated above, plaintiffs do not sufficiently allege that First Franklin exceeded its scope as a mere money lender so as to establish a fiduciary duty between it and plaintiffs, and plaintiffs' specific allegations of agency do not support an agency relationship between First Franklin and LRI.

Plaintiffs' fifth cause of action for violation of Business and Professions Code sections 17200 *et seq.* fails to state a valid cause of action. Under the UCL, standing extends only to "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322. Plaintiffs' claim also fails because plaintiff do not establish that they suffered injury and lost money or property as a result of unfair competition. *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1590. Plaintiffs do not establish that any act by any defendant caused loss to plaintiffs, that a specific law or laws that were violated, or that defendants committed fraud. A defense to the predicate claim is a defense to the UCL claim. *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1505.

Plaintiffs bear the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. A demurrer shall be sustained without leave to amend absent a showing by plaintiffs that a reasonable possibility exists that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The second amended complaint does not suggest on its face that it is somehow capable of amendment and plaintiffs have failed to make any showing that the first amended complaint can be amended to change its legal effect.

The court declines to consider the federal district court cases cited by defendants, as trial court decisions, either of the state or federal courts, are not precedential to this court. Defendants' request for judicial notice is granted as to Exhibits A through D. Defendants' motion to strike is dropped, as no moving papers were filed.

9. S-CV-0028003 Ryan, Richard vs. Level 3 Communications, LLC, et al

Defendant 360networks, Inc.'s demurrer to the complaint is sustained with leave to amend. Plaintiff argues that his complaint states a cause of action for a continuing trespass and/or nuisance, or alternatively that the statute of limitations has not run on a permanent

trespass and/or nuisance claim because of the delayed discovery rule. Neither is sufficiently pled so as to apprise defendants of the claims to which it must respond. However, contrary to 360networks, Inc.'s contention, it is not accurate that as a matter of law, the installation of an underground pipe constitutes a permanent trespass or nuisance. In *Spar v. Pacific Bell* (1991) 235 Cal.App.3d 1480, the trial court bifurcated the statute of limitations question for trial, and considered disputed facts regarding the purpose of the pipe, and the effort involved to install and remove it. *Field-Escandon v. Demann* (1988) 204 Cal.App.3d 228, also cited by defendant, involved the appeal of the granting of a summary judgment motion. Neither case is dispositive of the issue of whether plaintiff can plead that the underground fiber optic conduit pipe in the instant case is a continuing trespass.

Plaintiff's cause of action for quiet title is not sufficiently pled, as plaintiff has not stated a legal description of the property, and each defendant's adverse claim of right to the property. Finally, plaintiff's complaint as a whole is ambiguous, as plaintiff does not adequately identify each cause of action, or state the defendants against whom each cause of action is asserted. Cal. R. Ct., Rule 2.112.

Defendant's request for judicial notice is granted as to Exhibits A and B, and denied as to Exhibit C. Defendant is advised that non-California authorities need not be lodged with the court unless requested by the judge. Cal. R. Ct., Rule 3.1113(i).

10. S-CV-0028457 Matheny Sears Linkert & Jaime, LLP v. Moore, Wm. Andrew

The motion for summary adjudication is denied without prejudice as moot. The amended complaint supersedes the original for all purposes, and a motion for summary judgment directed to a superseded pleading is regarded as having been made moot by the filing of the amended pleading. *See State Comp. Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1130-1131.

11. S-CV-0029197 D. Augustine & Associates vs. Whichard, Amanda

Defendant's demurrer to the complaint is continued to December 20, 2011 at 8:30 a.m. in Department 40.

12. S-CV-0029207 Ruano, Chris vs. Sierra Joint Community College District

The motion to bifurcate and stay discovery was dropped.

13. S-CV-0029328 Valencia, Elaine, et al vs. State of California, et al

Plaintiff's petition for relief from claim's requirement is denied. The moving declarations are conclusionary in nature, and the opposing facts provided by the defendants tend to show petitioners were competent, were able to focus on matters related to the accident and went about some of their normal daily activities during the six-month period during which a tort claim would have been timely. The medical support which petitioners received also appears not to have been too extensive. Finally, petitioners have not replied to the opposition. The court concludes that petitioners have not carried their burden under Govt. Code 946.6 for relief from the requirements of Govt. Code 945.4.

Plaintiff's motion to quash subpoena and for protective order has been dropped by the moving party.

14. S-CV-0029391 Rancho Murieta Lodge Partners II vs. Equity Based Services

The motion to compel arbitration was continued, by stipulation of the parties, to January 10, 2012 at 8:30 a.m. in Department 40.

15. S-CV-0029415 Harris, Eric, et al vs. Ortiz, Jose Bermudez, et al

The expressly unopposed motion to quash service of the summons upon Jose Bermudez Ortiz is granted.

16. S-CV-0029607 Wakamatsu, Jody vs. General Motors LLC, et al

The petition of defendants Winner Chevrolet, Inc., Bank of the West and Federated Mutual Insurance Company to compel binding arbitration pursuant to contract and for stay of proceedings is denied. *Sanchez v. Valencia Holding Company LLC*, ____ Cal.App.4th ____, 2011 WL 5865694 (2 Dist. Nov. 23, 2011) (No. B228027).

17. S-CV-0029713 Outcome Resources, Inc. vs. Embrace Hospice, LLC

Petitioner's petition to confirm arbitration award is denied without prejudice. First, the court notes that petitioner is not properly before the court. While plaintiff purports to file its petition as "Outcome Resources, Inc. (Party without Attorney)", a corporation cannot represent itself in a court of record either in propria persona or through an officer or agent who is not an attorney. *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Board* (2002) 99 Cal.App.4th 1094, 1101. Further, there is neither a notice of hearing date on the petition, nor proof of service of notice of hearing date in the court's file. Perforce, there is no indication that the notice required by Local Rule 20.2.3 has been given. Thus there is no indication that respondent was provided with notice of the requested hearing date as required by Code of Civil Procedure sections 1290.2 and 1290.4. While there is a proof of service indicating that the petition was served by first class mail on respondent, such service is also insufficient under Code of Civil Procedure section 1290.4(b)(2), which requires mailing by registered or certified mail to an out-of-state party.

18. S-CV-0029994 Retz, Hunter - In Re the Matter of

The petition for compromise of the disputed claim of a minor is granted. Attendance by the minor is excused.

19. S-CV-0029995 Novak, Jenny - In Re the Matter of

The petition for compromise of the disputed claim of a minor is granted. Attendance by the minor is excused.

20. S-CV-0030083 Homsy, John, et al vs. Hawkins, Mark

The petition to release mechanic's lien is dropped. Moving party has informed the court that the case has been dismissed.

21. S-CV-0030147 U.S. Bank, N.A. vs. Pacific Park Apartments, LLC

The order to show cause re: appointment of receiver is continued, on the court's motion, to December 1, 2011 at 8:30 a.m. in Department 40.

22. S-PR-0005218 Ebert, Ronald L. and Judith A. - In Re the Trust of

The motion to reduce settlement is continued, on the court's motion, to December 1, 2011 at 8:30 a.m. in Department 40.

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